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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

CLIFFORD J. ANTONE,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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22 pp

QUESTIONS PRESENTED

1. Can tips lacking internal coherence transform innocent behaviour into suspicious activity to justify a warrantless arrest in a public place?

2. Must the record of an acceptance of a guilty plea provide affirmative evidence that the defendant understands the charge to which he pleads to be voluntary within the meaning of *McCarthy v. United States*, 394 U.S. 459 (1969)?

3. Can a plea to conspiracy under 21 U.S.C. sec. 846 be voluntary where the charge is not explained to the defendant and the factual basis fails to support the elements of the offense charged?

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*In the court of appeals and in the district court, petitioner's codefendants were Royce Hebert, Mikal Amuny and Aaron Maxwell.

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CLIFFORD J. ANTONE,

Petitioner,

v.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Clifford Jamal Antone prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which affirmed the judgment of conviction of the United States District Court for the Western District of Texas sentencing petitioner to imprisonment of five years and a fine of fifteen thousand dollars. Petitioner was convicted on his plea of guilty to one offense: conspiracy under 21 U.S.C. sec. 846 to violate 21 U.S.C. sec. 841(a) with respect to a quantity of marijuana. Petitioner's plea agreement preserved the issue of his unlawful arrest for appeal pursuant to Rule 11(a)(2), F.R.Crim.P.

OPINIONS BELOW

The district court's unpublished opinion denying petitioner's pretrial motion to suppress his arrest and the fruits

thereof is reprinted as Appendix A. The opinion of the court of appeals upholding the district court's ruling on the suppression motion and denying petitioner's challenges to the constitutional validity of his guilty plea raised on direct appeal is reprinted as Appendix B and reported as *United States v. Antone*, 753 F.2d 1301 (5th Cir. 1985)

JURISDICTION

The decision of the court of appeals was rendered on February 11, 1985. On March 15, 1985 the court denied the motions for rehearing timely filed by petitioner and some of his co-appellants.

This court has jurisdiction over this matter pursuant to 28 U.S.C. sec. 1254(1).

STATEMENT OF THE CASE

On October 28, 1982 a United States Customs officer received a tip that Allen Granger and another person were coming to Austin, Texas to meet Clifford Antone and an airplane pilotted by Mikal Amuny to purchase marijuana. The informant's story changed repeatedly over the next three days but the final version was that Granger and Randy in Granger's Monte Carlo would obtain the marijuana in the afternoon or evening of November 1.

The customs agent reported each version of the trip to the agent of the Drug Enforcement Administration in charge of the Austin area, and that agent attempted without success to verify each story reported. On the evening of November 1 the DEA agent organized a dragnet using agents and airplanes from three different agencies over most of Austin. The DEA agent had heard rumors months previously that negotiations for drug purchases would take place at public restaurants, followed by delivery by either Black or Mexican males.

The dragnet found Antone, an Austin resident, entering a public restaurant with Mikal Amuny. Aaron Maxwell left the restaurant and entered a Monte Carlo parked there.

Maxwell drove the Monte Carlo into the garage of a private home, and closed the doors behind him. The DEA agent deliberately followed him onto the property and pressed himself up against the side of the garage to eavesdrop, where he claimed to hear a car trunk open, three thuds and the trunk close. Maxwell left the garage, and again closed the doors. The agent testified that he could smell marijuana through the closed windowless doors of the garage.

The Monte Carlo returned to the restaurant, and when a different person, alone, entered the car and started to drive it away, the DEA agent ordered the driver's arrest and the arrest of all those in the restaurant. The police found a beeper in Antone's possession.

A search of the trunk of the Monte Carlo and of the house later authorized by search warrants revealed approximately 800 pounds of marijuana, and a beeper corresponding to the beeper on Antone's person.

Antone was finally charged in a four count indictment, count one of which alleged that he together with Amuny, Maxwell, Granger and Hebert conspired to distribute and possess with intent to distribute marijuana in violation of 21 U.S.C. secs. 841(a)(1) and 846. The only overt act attributed to Antone in this count was that he travelled to a restaurant. The remaining counts, charging violations of 21 U.S.C. sec. 841(a), were drawn in the language of the statute creating the crime.

Antone pleaded not guilty, and challenged his warrantless arrest as unconstitutional. The district court de-

nied his suppression motion and Antone pleaded guilty while preserving the search issue for appeal under Rule 11(a)(2), F.R.Crim.P.

Antone refused to admit the accuracy of the factual basis offered in support of the plea, and did not discuss the facts or the indictment with the judge. The government recited a brief description of its surveillance of Mr. Maxwell's activities, but said of Antone only that he had been observed talking to Black men at the restaurant, that he went to the restaurant with Amuny, that some of his documents were found in the house, and that in the five months before the arrest, calls had been placed from a phone to which Granger had access to the beeper in Antone's possession or to his home. The indictment was read into the record, and Antone was asked a series of routine questions. The crime of conspiracy was never described.

The court of appeals affirmed, in part because "Nothing in the record indicates that Antone failed to understand the charges against him." *United States v. Antone*, *supra*, 753 F.2d at 1305, app. 14a.

REASONS FOR GRANTING THE WRIT

I.
Search Issue

This case tests whether *Illinois v. Gates*, 462 U.S. 213 (1983) "totality of the circumstances test" creates a mumbo jumbo blessing to be muttered over every search which ultimately proves fruitful about someone's misdeeds. Here Antone was arrested without a warrant solely for being in a public restaurant at the time of an alleged drug deal. To uphold his arrest contradicts the teaching of *United States v. DiRe*, 332 U.S. 581 (1948), and so belies the statements in *Gates* that the opinion revivifies the common sense ap-

proach to informers taken before *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 204 (1969).

Rather the totality of these circumstances should have urged caution. The agents were unable to verify any of the customs agent's information over a period of four days. The informant's story kept changing. The individual supposed to be with Granger never materialized in any of the places predicted. No meeting at the restaurant was ever observed, and there was no evidence that any money changed hands. These pieces do not "fit neatly together" to justify an arrest without a warrant. *Massachusetts v. Upton*, — U.S. —, 80 L.Ed2d 721, 727 (1984).

Nor are they glued together by the DEA agent's rumor about drug purchase negotiations. First, his rumor was stale. *McKenzie v. Lamb*, 738 F.2d 1005 (9th Cir. 1984); *United States v. Jones*, 619 F.2d 494, 497-98 (5th Cir. 1980) Second, it was too vague to verified or unverified. Several restaurants were named. And the kind of individuals specified to make delivery encompass at least half of the population of the Austin neighborhoods near the restaurants. This was not a specific statement that a man in a blue suit would arrive at a specific train station carrying contraband. *Draper v. United States*, 358 U.S. 307, 309 (1959). *See also United States v. Cisneros-Mireles*, 739 F.2d 1000 (5th Cir. 1984) (informant stated that he had seen marijuana in plastic bags in a specific pickup within twenty four hours of the arrest)

Nor was Antone's behaviour, attendance at a public restaurant, consistent with drug dealing without regard to the tip, the test established by *Gates*, and previously followed by the Fifth Circuit. *See Illinois v. Gates*, *supra*, 462 U.S. at 243, (2000 mile trip to South Florida, known drug haven, for only overnight stay and immediate departure to Chicago

are "as suggestive of a prearranged drug run as of an ordinary vacation"); *United States v. Mendoza*, 722 F.2d 98, 101-02 (5th Cir. 1983) (travel in an evasive manner, use of pay telephones, inspecting car carefully for beeper devices, using false identification, inconsistent answers to police questions, several connections to Miami, and finally, lengthy stay inside closed non-airconditioned warehouse in extreme heat all made criminal conduct "substantially more likely than . . . innocent.")

II.
THE VOLUNTARINESS ISSUES

A. A Negative Standard

The Fifth Circuit applied a negative standard to determine whether the arraignment record adequately established Antone's understanding of the charges to which he pleaded. The opinion states: "Nothing in the record indicates that Antone failed to understand the charges against him." *United States v. Antone*, *supra*, 753 F.2d at 1305, app. 14a. This negative test, which looks for evidence of misunderstanding, conflicts with the language and purpose of Rule 11, F.R.Crim.P., decisions of this Court and prior cases in the Fifth and other circuits—all of which require that the record of a guilty plea's acceptance affirmatively demonstrate understanding.

McCarthy v. United States, 394 U.S. 459 (1969) states unequivocally that the record of a guilty plea's acceptance must affirmatively demonstrate that the plea is made with an understanding of the charge and its consequences. There the Court explained that a defendant's understanding the charge is essential to the constitutionally-required determination that a plea is voluntary. *Id.* at 466. The Court then explained that:

> . . . [Rule 11, F.R.Crim.P.] is designed to assist the district judge in making the constitutionally required

> determination a defendant's guilty plea is truly voluntary. Second, the *Rule is intended to produce a complete record* at the time the plea is entered *of the factors relevant to this voluntariness determination.*

Id. at 465 (emphasis added).

McCarthy expressly rejected the idea that the Court could assume understanding from an arraignment record silent on the subject, *Id.* at 464, 467, a conclusion fundamentally at odds with the Fifth Circuit's formulation of the standard. The Court explained that "assumptions not based upon recorded responses to a [judge's] inquiries" undermine the goals of determining that the plea is voluntary and insulating it from later collateral attack. *Id.* at 467.

The language of the Federal Rule itself imposes an affirmative burden to create a record demonstrating understanding. "Before accepting a plea of guilty . . . the court *must* address the defendant personally in open court and *inform him of* and determine that he understands . . . the nature of the charge to which the plea is offered . . ." Rule 11(c)(1), F.R.Crim.P. (emphasis added). The colloquy thus commanded "exposes the defendant's state of mind" on the record. *McCarthy, supra*, 394 U.S. at 467. *See also* Committee notes to the 1974 Amendments to Rule 11, F.R.Crim.P.

United States v. Dayton, 604 F.2d 931, 943 (5th Cir. 1979) (en banc) *cert. denied* 445 U.S. 904 (1980), also imposes an affirmative test: the record must provide "a common sense basis" for an appellate court to agree with a trial court's determination of voluntariness. Pre-*Dayton* cases in the Fifth Circuit also imposed a positive test. *United States v. Coronado*, 554 F.2d 166, 173 (5th Cir.), *cert. denied*, 434 U.S. 870 (1977) (the court should "engage in as extensive an interchange as is necessary to assure itself and any subse-

quent reader of the transcript that the defendant does indeed fully understand the charges."); *United States v. Adams*, 566 F.2d 962, 967-68 (5th Cir. 1978) ("no matter how simple the charges, a district court should . . . demonstrate on the record that the defendant understands")

The circuit's use of a negative test puts its opinion in conflict with *United States v. Corbett*, 742 F.2d 173 (5th Cir. 1984). There the government paraphrased the informtion to which the defendant pleaded by turning each accusation into a question. *Id.* at 179 n.15. The defendant openly admitted every element of the offenses to which he pleaded, and his counsel affirmed that the plea was made knowledgeably. However, the record of rearraignment contained no indication that the defendant had been told what the elements of the offense were, and the panel vacated the plea because the record did not affirmatively show understanding: "We have no way of knowing if Corbett in fact knew the elements of the crime with which he was charged." *Id.* at 180 n.16. *See also United States v. Punch*, 709 F.2d 889 (5th Cir. 1983) (judge must ensure first hand that "both he and the defendant know what those charges consist of").

Other circuits also apply a positive test. *United States v. Frye*, 738 F.2d 196 (7th Cir. 1984) (record does not show that the defendant understood waiver issues; plea open to collateral attack); *United States v. Wetterlin*, 583 F.2d 346, 350, n.6 (7th Cir. 1978), *cert. denied*, 439 U.S. 1127 (1979) (mere reading of the charges not enough to demonstrate that court determined that defendant understood the charges); *Mack v. United States*, 635 F.2d 20 (1st Cir. 1980) (record did not show understanding; court's assumption that defendant's discussions with his counsel had been adequate found insufficient); *Phillips v. United States*, 519 F.2d 483 (6th Cir. 1975) (purpose of Rule 11 is to make the validity of the plea dependent upon the completeness of the record as de-

veloped by the court); *United States v. Reigelsperger*, 646 F.2d 1235 (8th Cir. 1981). The circuit's opinion stands alone in upholding a plea because the record does not show lack of understanding.

Finally, the Fifth Circuit's opinion imposes an impossible burden. To prevail under the "Antone" test, a defendant must make a record demonstrating that he does not understand a charge at the time that he does not understand it. Heaven help the poor defendant who thinks that conspiracy is merely knowing about and being present at another's drug deal. He could affirm an indictment drafted in the statutory language, as did Antone, remain silent as to the admittedly ambiguous factual statement, as did Antone, and still be held to have made a voluntary and intelligent waiver of the rights crafted by due process to protect his innocence, because his record would not demonstrate the lack of understanding. This result is untenable in a "decent system of criminal justice." *Dayton*, *supra*, 604 F.2d at 935.

B. The Ambiguous Factual Basis

The Fifth Circuit's opinion stands alone in upholding a plea to an unexplained complex charge supported by an ambiguous and unadmitted factual basis. It therefore contradicts *Henderson v. Morgan*, 426 U.S. 637 (1976) and *Marshall v. Lonberger*, 459 U.S. 422 (1983).

The Fifth Circuit upheld Antone's plea to the unexplained charge of conspiracy where the factual basis was not admitted and it did not support all the elements of the crime. *United States v. Antone*, *supra*, 753 F.2d at 1305 n.1, app. 13a. Every other case which has found a record adequate to establish understanding based solely on a recitation of the charges in statutory language has also included a detailed discussion of the facts between the judge and the defendant or an admission that the facts are true and are

sufficient to support the plea. The failure of the factual basis offered to include evidence of the intent requisite for the murder charge in *Henderson v. Morgan*, 426 U.S. 637 (1976) defeated the claim that an understanding of the charge could be inferred from a record in which a detailed explanation of the charges were absent:

> There is nothing in the record that can serve as a substitute for either a finding after trial or a voluntary admission, that respondent had the requisite intent. Defense counsel did not purport to stipulate to that fact; they did not explain to him that his plea would be an admission of that fact; and he made no factual statement or admission necessarily implying that he had such intent. In these circumstances it is impossible to conclude that his plea to the unexplained charge of second degree murder was voluntary.

Id. at 646.

In the recent *Marshall v. Lonberger*, 459 U.S. 422, 428 (1983) counsel expressly stipulated that the indictment to which defendant pleaded was "both sufficient in law and in fact to sustain . . . a finding of guilty on the charges." Therefore, although the factual basis requirement of Rule 11(f), F.R.Crim.P., also serves other purposes, its completeness is essential to a demonstration that "the defendant possesses an understanding of the law in relation to the facts." *McCarthy, supra*, 394 U.S. at 465. *See also Godwin v. United States*, 687 F.2d 585, 589 & n.4 (2nd Cir. 1982); *United States v. Boatwright*, 588 F.2d 471, 475 (5th Cir. 1977); *Sierra v. Government of the Canal Zone*, 546 F.2d 77, 81 (1977). The Fifth Circuit's opinion ignores this synergy between Rule 11(f), F.R.Crim.P., and Rule 11(c)(1), F.R.Crim.P.

The stipulation *Marshall v. Lonberger, supra*, 459 U.S. at 428, about the adequacy and truth of the factual basis,

rebuts the Henderson-Lonberger presumption here that counsel will have explained the elements of a charge to a defendant. *Id.* at 437-38. The argument is not about ritual - whether a judge said the magic word "the elements of the crime to which you plead guilty are . . ." - but about whether at the moment the defendant voluntarily submits to punishment and religuishes his due process rights he understands his actions. *Boykin v. Alabama*, 395 U.S. 238 (1969); *McCarthy v. United States*, *supra*, 394 U.S. at 466. An explanation of the crime could justify such a conclusion, *see Harned v. Henderson*, 588 F.2d 12 (2nd Cir. 1978), as could a discussion or admission of the facts underlying the crime. *Marshall v. Lonberger*, *supra*, 549 U.S. at 428. But the *Henderson-Lonberger* presumption did not reverse the *McCarthy* holding that judges accepting guilty pleas may not relie on assumptions about counsel to demonstrate understanding-and hence reduce any understanding complaint to a charge of ineffective assistance. *McCarthy v. United States*, *supra*, 394 U.S. at 467. It rather established that ritual - the incantation of the elements of a crime before a plea is accepted- neither proves or disproves the understanding required for a voluntary waiver. *Henderson v. Morgan*, *supra*, 426 U.S. at 644.

Therefore, Antone's answering "yes" to a question phrased in the language of the statute cannot stand as adequate insurance that his plea was voluntary where he expressly withheld admission of the truth of the factual basis offered and that basis does not support the elements of the conspiracy charge. *Compare United States v. Antone*, *supra*, 753 F.2d at 1305, app. 13a, (factual basis unadmitted and does not support every element of the crime to which plea is offered) *with United States v. Jack*, 686 F.2d 226, 228 n.2. (5th Cir. 1980) (factual basis provided overwhelming evidence of each element of conspiracy and admitted) and

United States v. Araiza, 693 F.2d 382, 384 (5th Cir. 1982) (factual basis admitted and Araiza discussed facts with the judge). *See also Godwin v. United States*, *supra*, 687 F.2d 585; *Alessi v. United States*, 593 F.2d 476, 479-80 (2nd Cir. 1979); *Rizzo v. United States*, 516 F.2d 789, 793 (2nd Cir. 1975); *United States v. Boatwright*, *supra*, 588 F.2d at 475; *Sierra v. Government of the Canal Zone*, 546 F.2d 77, 81 (1977); *United States v. Frye*, *supra*, 738 F.2d at 200; *Mack v. United States*, 635 F.2d 476 (1st Cir. 1980); *United States v. Cody*, 438 F.2d 287 (8th Cir. 1971). Ritual does not prove understanding.

CONCLUSION

For all these reasons, petitioner prays that the writ be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

CRIMINAL NO. A-82-CR-155
and A-82-CR-153

UNITED STATES OF AMERICA

VS.

CLIFFORD J. ANTONE,
MIKAL HABEEB AMUNY,
ROYCE DAVID HEBERT a/k/a
ROY SNEED, AND AARON MAXWELL

AMENDED FINDINGS OF FACT

1. On October 28 and October 29, 1982, DEA Special Agent Richard Braziel, in Austin, Texas, was contacted by telephone by Customs Patrol Officer Dave Harrison in Beaumont, Texas. CPO Harrison advised Agent Braziel that he had received information from a confidential informant that Allen Granger and a Randy, last name unknown, were coming to Austin, Texas, to meet Clifford Antone and Mikal Amuny to pick up a quantity of marijuana.

2. Agent Braziel advised Texas Department of Public Safety Narcotics Officer Bob Nestoroff to check the residences of Antone and Amuny during this period of time. Officer Nestoroff observed nothing out of the ordinary.

3. On November 1, 1982, CPO Harrison again telephoned Agent Braziel. CPO Harrison advised Agent Braziel, that according to his confidential informant, an aircraft had landed with a load of marijuana and Granger was in Austin, Texas, to

meet with Antone and Amuny that evening to obtain a quantity of marijuana. CPO Harrison further gave a description to Agent Braziel of the automobile by make, color, and license number that Granger was to be driving and transporting the marijuana.

4. CPO Harrison informed Agent Braziel that his confidential informant had supplied reliable information in the past that had led to six arrests and the seizure of a quantity of marijuana and that the informant was obtaining his information through conversations with Granger.

5. Agent Braziel had also received information prior to November 1, 1982, from a separate confidential informant, to the effect that Antone would conduct his marijuana transactions at a restaurant located near IH35 and Oltorf and would utilize a Black male to make the delivery of the marijuana.

6. Based upon this information, Agent Braziel had a surveillance placed on the residences of Antone and Amuny, the club operated by Antone, and the JoJo's and Denny's restaurant located at the intersection of IH35 and Oltorf in Austin, Texas.

7. At approximately 7:00 to 7:30 P.M., on November 1, 1982, Agent Braziel saw Antone at the JoJo's parking lot next to a black Continental registered to Amuny talking to an unknown Black male. A second Black male, later identified as Aaron Maxwell, exited a pickup with a camper shell and walked over and met with Antone and the unknown Black male. Antone and the unknown Black male departed in the Continental automobile and Maxwell departed in the Chevrolet pickup. Agent Braziel lost surveillance and notified other officers by radio.

8. Officer Nestoroff observed the Chevrolet pickup being driven by Maxwell arrive at the residence of Amuny. Maxwell exited the pickup and entered a blue Oldsmobile. Officer Nestoroff followed Maxwell to Antone's club.

9. Agent Braziel located the Continental automobile driven by Antone at Antone's residence. Braziel observed two people enter a Buick automobile located at Antone's residence and

depart the premises. Officer Nestoroff eventually picked up surveillance of the Buick automobile and identified the driver as Amuny and Antone as the passenger. Officer Nestoroff followed the vehicle back to the JoJo's restaurant located at IH35 and Oltorf.

10. At the JoJo's restaurant, Agent Braziel and Officer Nestoroff additionally observed in the parking lot the blue Oldsmobile previously driven by Maxwell and the vehicle CPO Harrison advised Granger would be driving.

11. Maxwell was subsequently observed entering Granger's vehicle and driving to a 7-11 convenience store where he made a phone call. He is then observed driving to 1713 Sylvan Drive where he enters the garage and the door is closed. Agent Braziel pursues Maxwell on foot and places himself next to the house in some bushes.

12. Agent Braziel walked up to the garage door and heard the trunk open, something being loaded into the trunk, and the trunk closed. He also smelled the odor of marijuana. The garage door then opened and Maxwell exited the residence in Granger's vehicle. Surveillance followed Maxwell back to the JoJo's restaurant from where he had originally departed in Granger's vehicle.

13. Maxwell was observed getting out of the vehicle and walking into the JoJo's restaurant. Shortly thereafter, Granger walked out of the restaurant and entered his vehicle. He was arrested by Agent Braziel and others while stopped at a red light. At the time of his arrest Agent Braziel noticed the odor of marijuana coming from Granger's vehicle.

14. Agent Braziel seized Granger's vehicle and obtained a search warrant. A search of the vehicle revealed three bundles of marijuana in the trunk weighing approximately 58 pounds.

15. Agent Braziel obtained a federal search warrant for the residence of 1713 Sylvan Drive. The search of that residence resulted in the seizure of approximately 1,000 pounds of marijuana, scales and packaging material for marijuana, personal